

IDAHO NATURAL RESOURCES LEGAL FOUNDATION, INC., ET AL.

IBLA 88-631

Decided June 21, 1990

Appeal from a decision of the Area Manager, Bruneau Resource Area, Boise, District Office, Bureau of Land Management, authorizing construction of a water pipeline and storage reservoir based on an environmental assessment and finding of no significant impact. ID-01-87-70.

Set aside and remanded.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Compliance with the National Environmental Policy Act of 1969 requires BLM to take a hard look at the issues, identify relevant areas of environmental concern, and, where no EIS is prepared, make a convincing case that the potential environmental impacts are insignificant. Where a finding of no significant impact is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required.

APPEARANCES: Edwin W. Stockly, Esq., Eagle, Idaho, for appellants; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Idaho Natural Resources Legal Foundation, Inc., et al., 1/ appeal from a decision of the Area Manager, Bruneau Resource Area, Boise, District office, Bureau of Land Management (BLM), dated July 20, 1988, authorizing the construction of 7.7 miles of water pipeline (the Wickahoney

1/ Counsel for the Idaho Natural Resources Legal Foundation, Inc., filed a notice of appeal on behalf of the Foundation, the Wilderness Society, the Committee for Idaho's High Desert, and Russ Heughins. The Committee for Idaho's High Desert filed a separate notice of appeal which it withdrew by notice filed Sept. 19, 1988. The Board dismissed the separate appeal by order dated Sept. 20, 1988.

mainline) and a 2.5-million-gallon storage reservoir. The decision concluded that the proposed project would not have significant impacts on the environment and that, therefore, preparation of an environmental impact statement (EIS) was not required pursuant to section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982). That finding of no significant impact (FONSI) was based on the environmental assessment (EA) prepared for the project and certain stipulations and conditions of approval attached to the decision record which are to be agreed to and/or fulfilled prior to approval of construction on the project. 2/

Appellants challenge the adequacy of the EA and the resultant FONSI, arguing that the EA does not take a hard look at the issues, identify the relevant areas of concern, or make a convincing case that the environmental impacts would not be significant. Appellant argues that the EA upon which the FONSI is predicated was not undertaken in good faith because advance planning, design, and development of the spring had been authorized. Appellant contends the expenditure of funds on spring development was an irrevocable commitment of resources to the project prior to preparation of the EA. Further, appellant argues that the conditions or stipulations attached to the EA upon which the FONSI was predicated should have been fulfilled prior to such a determination. Specifically, appellant cites the proposed agreement between BLM and the Idaho Department of Fish and Game for management of the aquatic/riparian environment of Wickahoney Creek below the spring. Noting that the EA disclosed the potential for destruction of the red band trout in the creek due to the combination of reduced water flow resulting from the project and winter icing of the stream, appellant contends the mitigation measures should be set forth in the EA in order to comply with NEPA requirements.

In answer to appellant's brief, BLM notes that "a number of agreements need to be negotiated before this 7.7 miles of mainline will be started by the Bureau as indicated by the exhibit attached to the decision" (Answer at 3). BLM asserts that "[t]he withdrawal of more water from Wickahoney Spring will be subject to an agreement with the Idaho Department of Fish and Game that will serve to protect the aquatic and riparian values of Wickahoney Creek and the red band trout habitat" (Answer at 3-4). With respect to development of the spring itself prior to the EA, BLM explains that there was no way to know if the spring was capable of providing enough water to support a pipeline prior to expending funds required to develop this information and that this expenditure did not commit BLM to construct the pipeline.

2/ The authorized project is designed to allow for future expansion to encompass a 90-mile water pipeline system. The pipeline would replace existing water-hauling operations in various grazing allotments and provide new water sources in others, allowing for better distribution and management of livestock. Although the proposed action is a limited part of the potential system, the EA analyzed the potential cumulative impacts of the entire system, including future pipeline extensions and laterals.

BLM acknowledges in its answer "that the agreements necessary to finalize the Bureau's decision to construct the pipeline are not yet in place" (Answer at 5). It is argued that the pipeline will take several years to construct in light of budgetary constraints and that, hence, "it is necessary to do some planning and construction simultaneously to efficiently implement such long-range plans" (Answer at 5).

The EA upon which the FONSI is predicated discloses that:

Implementation of the proposed action would reduce the flow of Wickahoney Creek from October 15 to June 1 of each year. Flow at Wickahoney Spring is estimated at a [sic] 150 gallons/minute. The pipeline is capable of removing up to 100 gallons/minute from the spring head. * * * An analysis of the impacts to Wickahoney Creek and its dependent redband trout population is difficult without a more thorough understanding of the minimum water flow which would enter Wickahoney Creek from Wickahoney Spring after pipeline activation and the relative contribution of other area springs to the flow of Wickahoney Creek. Based on the limited data available the proposed action could reduce or even jeopardize the continued survival of redband trout within the 4-mile stretch of Wickahoney Creek between the spring and the Buncel Reservoir. Survival of redband trout is contingent upon a multitude of habitat components (i.e., bank stability, stream structure, aquatic insect production, etc.), but the key components to consider in this analysis are volume of water, time of year, and length of time fish must survive under minimum water flow conditions. Since the Wickahoney pipeline would draw water primarily during the winter, the remaining flow in the creek would be more susceptible to a complete freeze than under current conditions. A complete freeze of Wickahoney Creek would eliminate the current population of fish from the creek.

(EA at 14). This analysis in the EA draws support from a comment on the impact on the red band trout in a July 14, 1988, letter from the Idaho Department of Fish and Game addressed to the Boise District Office, BLM. ^{3/} The sole basis for the FONSI which addressed this impact was stipulation 5 attached thereto which provided in part that "[a]n aquatic/riparian management plan for Wickahoney Creek shall be prepared."

[1] Compliance with NEPA, 43 U.S.C. § 4332(2)(C) (1982), regarding a range improvement project such as the pipeline at issue here requires BLM to take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that the potential environmental impacts are insignificant in order to support a conclusion that an EIS is not

^{3/} The potential impact on the red band trout was not mentioned in an earlier letter from the Idaho Department of Fish and Game dated Sept. 9, 1987, which commented on the draft EA.

required (i.e., a FONSI). Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 39 (1987); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). A FONSI may be predicated on a finding that changes to or restrictions on a project will sufficiently minimize the environmental impact. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); California Wilderness Coalition, 98 IBLA 314 (1987); Glacier-Two Medicine Alliance, *supra*; D. Mandelker, NEPA Law & Litigation § 8:55 (1984). However, in such circumstances, NEPA requires analysis of any proposed mitigation measures and how effective they would be in reducing the impact to insignificance. Northwest Indian Cemetery Protective Ass'n. v. Peterson, 795 F.2d 688, 696-97 (9th Cir. 1986); *see* 40 CFR 1502.16(h).

In the present case, we find this analysis to be lacking. Notwithstanding the conclusion in the EA that the continued existence of red band trout in Wickahoney Creek is threatened by the project, no details are provided about the management plan to be developed between BLM and the Idaho Department of Fish and Game in order to protect the trout. Rather, stipulation 5 attached to the FONSI provides in part that: "An aquatic/ riparian management plan for Wickahoney Creek shall be prepared and mutually agreed to in writing by the BLM, Cooperators, The Department and the Idaho Department of Fish and Game." In the absence of any details regarding mitigation, there is no analysis upon which a FONSI may be predicated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge